THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBIN VERNON, et al., Plaintiffs, vs. QWEST COMMUNICATIONS INTERNATIONAL, INC., et al., Defendants.	Case No. 08-1516 TSZ DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT **NOTE ON MOTION CALENDAR: FRIDAY, APRIL 17, 2009** **ORAL ARGUMENT REQUESTED**

Qwest Communications International Inc., Qwest Services Corp., Qwest Corp., Qwest Communications Corp., and Qwest Broadband Services, Inc. (collectively "Defendants" or "Qwest") hereby move to dismiss the Plaintiffs' First Amended Complaint ("FAC").

INTRODUCTION

After the briefing on Qwest's Motion to Dismiss the original Complaint was completed, the Plaintiffs filed the FAC, joining another named Plaintiff. Although the Plaintiffs had the opportunity to address many of the deficiencies in the Complaint with the FAC, they did not, and the deficiencies remain.

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Like the original Complaint, the FAC should be dismissed because Plaintiffs' claims are barred in whole or in part by the filed tariff doctrine, because Plaintiffs lack standing to bring their claims, because Plaintiffs claim that five Qwest Defendants fraudulently misled them and yet Plaintiffs fail to plead these claims with the required specificity, and because Plaintiffs have failed to plead claims upon which relief may be granted.

First, any claims based on contracts formed or upon Qwest's purported representations made before January 28, 2006 are barred by the filed tariff doctrine. Plaintiffs Vernon and Durkin claim that they began subscribing to Qwest's internet service in 2004 and 2005, respectively. Plaintiffs also seek to represent a class of "customers, who, since October 15, 2002, have been subject" to a termination liability assessment that applies to those subscribers who breach their two-year high speed internet service contract. (Am. Compl. ¶ 36.) Yet, prior to January 28, 2006, the high speed internet services to which Plaintiffs subscribed were governed by tariffs filed with the Federal Communications Commission ("FCC"). During that period, Qwest could only offer internet service in accordance with the filed tariffs. Accordingly, these mandatory federal tariff filings bar any claim or liability that arose prior to the deregulation for alleged high speed internet contracts, and such claims must be dismissed.

Second, Plaintiffs have failed to establish standing as to a claim against any particular named Defendant and lack standing as to the majority of the claims they assert. Although Plaintiffs have named five separate Qwest entities, the Plaintiffs have never identified which entity provided them with service, which entities they have had communications with, or even which entity sent them the bill containing the charge that they now challenge. As such, Plaintiffs have failed to establish standing against any particular Defendant. Moreover, Plaintiffs lack standing to assert claims for violations of consumer protection act claims in states where they do not reside.

Third, Plaintiffs have brought claims sounding in fraud, but have failed to plead such claims with the required particularity. Plaintiffs claim that Qwest omitted material information – the

existence of a contract term or duration and the corresponding consequence for a breach of that term – in order to induce Plaintiffs and other class members to sign up for Qwest's high speed internet service. Plaintiffs assert that once Qwest had lured the subscribers to its service, it used the hidden termination liability to "lock" the subscribers into Qwest's service by misrepresenting that they had agreed to the term contract. Plaintiffs also claim that Qwest affirmatively misrepresents the existence of the contracts. These claims of material omissions and affirmative misrepresentations all sound in fraud, but Plaintiffs have failed to plead the details necessary to sustain such claims against a motion to dismiss. Moreover, Plaintiffs' claims regarding fraud as to Plaintiffs Vernon and Durkin must fail as a matter of law on the grounds that when these Plaintiffs first signed up for internet services with Qwest, the services were governed by filed tariffs. There was no contract to lure Plaintiffs to, nor were there any hidden terms and fees – there could not have been because all of the terms and conditions were contained in the public tariffs as mandated by the FCC.

Finally, Plaintiffs' claims suffer from other defects as well. For example, Count I for "unlawful penalties" does not state a claim that is recognized in any state where Qwest provides its high speed internet service. Count II for unjust enrichment cannot be maintained in the face of the express contract, the High Speed Internet Subscriber Agreement ("Subscriber Agreement" or "Agreement") that governs the parties' relationship. And Count IV for a declaratory judgment fails because it does not allege any basis for declaratory relief, let alone the application of the statute of frauds.

FACTUAL AND PROCEDURAL BACKGROUND

Qwest Corporation has been providing high speed internet services to subscribers in fourteen states since 2000.[1] (*See* Qwest Commc'ns Int'l 2001 Form 10-K at 6, Travis Leo Decl., Ex. A.) Qwest and its predecessors have historically provided traditional telephone

[1] Qwest provides residential high speed data service in Arizona, Colorado, Iowa, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

services. Qwest was therefore considered a "facilities-based wireline broadband Internet access service provider," subject to FCC regulation. *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 F.C.C.R. 14853, ¶ 4 (2005) ("FCC Wireline Broadband Order"). The FCC eventually deregulated high speed internet services offered by companies such as Qwest, but before January 28, 2006, Qwest provided this service to subscribers pursuant to tariffs that were required to be filed with the FCC. (Qwest Tariff No. 1, effect. through January 27, 2006; Janila Beach Decl., Ex. H.)

As part of the deregulation process, Qwest sent letters to every internet subscriber, explaining that the service would soon be deregulated and that if they wanted to maintain their service, it would be governed by the Subscriber Agreement. (Leo Decl. ¶ 9.) Beginning in January 2006, customers were given several months to decide whether to maintain their service, pursuant to the terms and conditions of the Subscriber Agreement, or to cancel their service to avoid the terms of the contract. (*See* Sample Letter to Customers December, 2005, Leo Decl., Ex. J.) A customer who did not want to be governed by the Subscriber Agreement was allowed to cancel its service without penalty. (Leo Decl. ¶ 10.)

Qwest now provides its high speed internet service subject to a Subscriber Agreement. (Am. Compl. ¶¶ 13, 29; Leo Decl. ¶ 9, Ex. B.) In the "Term and Termination" section of the Subscriber Agreement, there is one set of terms for subscribers who elect to take services on a month-to-month basis and a different set for those subscribers who agree to a two-year contract. (Sub. Ag. ¶¶ 12(b)(c), Leo Decl., Ex. B.) Qwest began offering the two-year contract in the spring of 2006 in a promotion known as "Price for Life." (Leo Decl. ¶ 17.) Price for Life subscribers are guaranteed one low rate for as long as they maintain their service without change. (*Id.*) In contrast, a subscriber who takes monthly service without a two-year commitment is subject to the possibility of subsequent rate increases. (*Id.*) In exchange for

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receiving the permanent Price for Life discounts, a Price for Life subscriber agrees to purchase the high speed internet service for at least two years. (*Id.*; Ex. B ¶ 12(c).) The Price for Life subscribers also agree that if they breach the contract by terminating before two years have expired, they will pay a $200 early-termination charge or termination liability assessment ("TLA"). (Ex. B ¶ 12(c).) A subscriber who selects the multiyear Price for Life promotion confirms his or her agreement and order before the order is complete. (Leo Decl. ¶¶ 18, 20.)

Additionally, shortly after subscribers sign up for Qwest's high speed internet or change the terms of their services (*e.g.*, by upgrading the speed of service), they receive a letter that identifies the services and products ordered. (*Id.* ¶ 22.) When the subscriber has selected Price for Life, the letter informs the subscriber about the two-year term commitment, the corresponding $200 TLA, and how to review the Subscriber Agreement. (*Id.*) The Subscriber Agreement provides that a subscriber may cancel his service in the first 30 days, and Qwest will waive the TLA if he does not agree with the terms and conditions in the Subscriber Agreement. (Ex. B ¶ 12(a)(iii).)

Plaintiff Vernon asserts that, in approximately 2005, she ordered internet service through Qwest and upgraded to Price for Life in April 2007. (Am. Compl. ¶ 18.) She says she called Qwest to cancel her internet service in approximately May 2008 and was told that there was no cancellation fee, but later received a bill that included a $200 TLA, which she has not paid. (*Id.* ¶ 23.)

Plaintiff Durkin began subscribing to Qwest's internet service in 2004 and upgraded to Price for Life in approximately March 2007. (*Id.* ¶ 25.) Durkin cancelled his internet subscription in 2008 after being informed that the cancellation would result in the imposition of the $200 TLA. (*Id.* ¶ 28.)

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Plaintiff Sandquist subscribed to Qwest's Price for Life internet service beginning in August 2007. (Am. Comp. ¶ 29.) He then cancelled in December 2008 and paid the TLA. (*Id.* ¶¶ 30, 32.)

The Plaintiffs purport to be suing on behalf of all similarly situated Qwest Price for Life customers who were charged the TLA. (*Id.* ¶ 32.)

ARGUMENT

I. PLAINTIFFS' CLAIMS THAT AROSE BEFORE 2006 ARE BARRED BY THE FILED TARIFF DOCTRINE.

Plaintiffs purport to represent a class of Qwest customers "who, since October 15, 2002, have been subject to" a TLA. (*Id.*) Plaintiffs' or any class claims arising before January 28, 2006, however, are barred by the filed tariff doctrine under federal law. Prior to January 28, 2006, Qwest's high speed internet services were offered pursuant to tariffs that Qwest was required to file with the FCC. These mandatory tariffs have the force of federal law, and Plaintiffs may not pursue any claim that would have the effect of altering Qwest's tariffed rates, including any TLA. Indeed, any claim that is based upon the relationship between the parties prior to January 2006 must fail on the grounds that the filed tariffs completely governed Qwest's actions at that time.

A. Until January 28, 2006, The Terms Of Qwest's High Speed Internet Were Governed By Mandatory Tariffs.

Until recently, Qwest's high speed internet service was subject to FCC regulation. Qwest was a "facilities-based wireline broadband Internet access service provider." *See generally* FCC Wireline Broadband Order, 20 F.C.C.R. 14853. While Qwest's high speed internet services were regulated, Qwest was required to file tariffs with the FCC that detailed the rates and terms upon which Qwest offered such services. (Qwest Tariff No. 1, Beach Decl., Exs. H-I.) Qwest could not deviate from these tariffs and was required to provide its internet services to all subscribers – residential, business, retail and wholesale – on non-

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discriminatory terms. *See* 47 U.S.C. § 203(c). Moreover, the terms and conditions of the service were entirely governed by the tariffs. Qwest could not offer separate contracts for the services. Customers were not misled as to the terms of their services because those terms were incorporated into the tariffs, which having the force of law, were readily available for any customer to review at any time.

On September 23, 2005, the FCC entered a Report and Order to deregulate wireline broadband Internet access services provided by facilities-based carriers, such as Qwest. *See* FCC Wireline Broadband Order; *see also Time Warner Telecom Inc. v. FCC*, 507 F.3d 205, 213-24 (3d Cir. 2007) (rejecting challenge to Wireline Broadband Order). This Report and Order was published on October 17, 2005 and became effective on November 16, 2005. The Wireline Broadband Order permitted facilities-based high speed internet service providers such as Qwest to either continue providing their service as a common carrier or to offer such services on a de-tariffed basis. *See* FCC Wireline Broadband Order ¶ 5. Qwest elected to begin providing its high speed internet service on a de-tariffed basis and filed an amended tariff with the FCC. Qwest's new tariff became effective on January 28, 2006, and high speed internet customers who subscribed after this date were no longer offered services under Qwest's tariffs. (*See* FCC Tariff No. 1 § 8.994, Beach Decl., Ex. I.)

B. The Filed Tariff Doctrine Bars Plaintiffs' Claims Arising Out Of Conduct Prior To January 28, 2006 As A Matter Of Law.

The filed tariff doctrine bars any claims related to the TLA that arose before January 28, 2006. As a common carrier subject to regulation with respect to its internet services, Qwest was required to file tariffs addressing its charges and the practices and regulations affecting such charges. *See* 47 U.S.C. § 203(a). Qwest's filed tariff had the effect of law, prohibiting Qwest from deviating from such tariff, regardless of what representations it made to its customers. *See* 47 U.S.C. § 203(c); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Just as Qwest could not alter its rates, terms or conditions, Plaintiffs

cannot challenge or alter such rates, terms or conditions through state law claims. *See id.*; *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1170 (9th Cir. 2001) ("Under the filed tariff doctrine, no one may bring a judicial challenge to the validity of a filed tariff.").

Courts have routinely recognized the applicability of the filed tariff doctrine to claims such as those asserted by Plaintiffs. For example, in *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424, 430 (4th Cir. 2004), plaintiff filed a class action complaint alleging that BellSouth's Federal Universal Service Charges ("FUSC") passed on to customers were excessive, and that BellSouth failed to disclose information about the FUSC to customers in violation of North Carolina law prohibiting "unfair or deceptive" trade practices. Regarding plaintiff's request for a refund of a portion of the FUSC, the court held: "[T]he amount of the FUSC is determinatively set forth in BellSouth's tariff, which carries the force of federal law . . . . [B]ecause [plaintiff's claim] would require the court to determine a reasonable rate for the FUSC, that claim must be dismissed pursuant to the filed-rate doctrine." *Id.* at 432. "[T]he filed tariff doctrine bars even claims for misrepresentation or fraud based on a carrier's alleged nondisclosure of a tariff . . . ." *Hardy v. Claircom Commc'n Group, Inc.*, 86 Wn. App. 488, 492, 937 P.2d 1128, 1131 (W. Ct. App. 1997).

In addition to rates, the tariffs also completely governed the terms and conditions by which Qwest offered its internet service prior to deregulation. As such, "the filed-rate doctrine bars state-law claims not only that pertain directly to the price of telecommunications services subject to [a regulatory] filing, but also state-law claims that concern various *nonprice* aspects, such as 'service, provisioning, and billing options.'" *ICOM Holding, Inc. v. MCI Worldcom, Inc.*, 238 F.3d 219, 222 (2d Cir. 2001) (quoting *Cent. Office Tel.*, 524 U.S. at 220) (emphasis in the original). Accordingly, to the extent that Plaintiffs base claims upon and seek damages for any alleged omissions or misrepresentations pertaining to alleged contract terms and conditions on which Qwest offered its services prior to deregulation, those claims are barred. *See Cent.*

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Office Tel., 524 U.S. at 222 (holding that carrier cannot be held to a "promised rate if it conflicts with the published tariff").

II. PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS.

Plaintiffs fail to establish standing for their claims against any particular named Defendant, and cannot establish standing to assert state law claims in states where they have no contacts. A complaint must allege facts showing that a plaintiff has standing as to each defendant. *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982) (citation omitted) (holding that unless plaintiffs can demonstrate the requisite case or controversy between themselves personally and each defendant, no plaintiff may seek relief on behalf of himself or any other member of the class); *see also Herlihy v. Ply-Gen Indus., Inc.*, 752 F. Supp 1282, 1291 (D. Md. 1990) (holding plaintiffs lack standing "in the absence of an allegation of specific wrongful conduct of a named defendant. . . . ")

First, Plaintiffs fail to allege sufficiently that they have been injured by a particular Defendant's alleged conduct. No Plaintiff alleges that she or he: (i) contracted with a *specific* Defendant; and (ii) was charged a TLA by a *specific* Defendant. Instead, without explanation Plaintiffs claim they each received a bill from the generic "Qwest" and that their bills included a TLA. (Am. Compl. ¶¶ 19, 27.) There are no allegations as to each Defendant's individual role in the events alleged in the FAC, and there are no allegations to support the bald contention that Plaintiffs had a relationship with each Defendant. There is no basis to conclude that each named Defendant allegedly engaged in conduct directed at, or that caused any injury to, Plaintiffs. *See Tajalle v. City of Seattle*, No. C07-1509Z, 2008 WL 630061, at *3 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 127 S. Ct. 1955, 1966 (2007)) ("When a complaint fails to adequately state a claim, such deficiency should be 'exposed at the point of minimum expenditure of time and money by the parties and the court.'").

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Second, Plaintiffs lack standing to assert claims under the consumer protection act statutes of states where the Plaintiffs do not reside. "[A]t least one named plaintiff must have standing with respect to each claim the class representatives seek to bring." *In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1107 (N.D. Cal. 2007) (citing *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987) ("a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.")); s*ee also In re Apple & AT&TM Antitrust Litig.*, No. C 07-05152 JW, 2008 WL 4810067, at *15-17 (N.D. Cal. Oct. 1, 2008). Here, the Plaintiffs reside in Washington and Minnesota, respectively, but purport to assert claims under consumer protection acts in twelve other states. Any claims for states outside their respective states of residency should be dismissed.

III. PLAINTIFFS FAIL TO PLEAD COUNTS II AND III WITH PARTICULARITY.

The Plaintiffs have pled no additional facts in the FAC to support the particularity requirements of their consumer protection act and unjust enrichment claims. As with the original Complaint, the claims sound in fraud and should be dismissed for failure to be pled with particularity.

A. Plaintiffs Allege A Uniform Course Of Fraudulent Conduct By Qwest.

The Plaintiffs' consumer protection act and unjust enrichment claims distill down to the allegations of fraud: that Qwest intentionally concealed and misrepresented information to induce Plaintiffs to accept Qwest's service and to deter Plaintiffs from canceling service, all for Qwest's alleged benefit. (*See* Am. Compl. ¶¶ 20-22, 26, 28, 60.) A claim "sounds in fraud" when it relies on a unified course of fraudulent conduct. *See, e.g.*, *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Though Plaintiffs avoid using the term "fraud," their FAC relies on a unified course of fraudulent conduct. *Cf. Anderson v. Clow (In re Stac Elecs. Sec. Litig.)*, 89 F.3d 1399, 1405 n.2 (9th Cir. 1996) (noting failure to use word "fraud" does not change nature of claim). Qwest is alleged to have made material omissions and

misrepresentations to all of its individual high speed internet customers, knowing of the statements' falsity, with the intent to induce Plaintiffs to buy or continue Qwest's service, and Plaintiffs and other class members relied on those misrepresentations in obtaining and maintaining Qwest's services. These facts, which form the basis of Plaintiffs' consumer protection/fraud act claims and their unjust enrichment claim, sound in fraud.

When, as here, unjust enrichment claims and those brought under state consumer protection acts sound in fraud, Rule 9(b) requires that fraud be alleged with particularity as to "who, what, when, and where" constituted the fraud. *See, e.g.*, *Duran v. Clover Club Foods Co.*, 616 F. Supp. 790, 793 (D. Colo. 1985) ("[A]llegations of deceptive trade practices under the [Colorado Consumer Protection] Act are subject to Rule 9(b)'s requirement of particularity."); *Tuttle v. Lorillard Tobacco Co.*, 118 F. Supp. 2d 954, 963-64 (D. Minn. 2000) (same with regard to Minnesota law).

In *Fidelity Mortgage Corp. v. Seattle Times Co.*, 213 F.R.D. 573 (W.D. Wash. 2003), plaintiffs claimed that defendant violated, *inter alia*, the Washington Consumer Protection Act, in publishing interest rates. The court noted that "[a]ll of plaintiff's claims rest on the allegation that defendant Seattle Times Co. 'knowingly publish[es] false, deceptive, and/or misleading Interest Rates in [their] Print and Online publications.'" *Id.* at 574 (citing complaint). The court held that the complaint "evidence[d] allegations that 'sound in fraud,'" and granted the motion to dismiss. *Id.* So, too, in the instant case where Plaintiffs allege a purportedly Qwest-wide practice of omissions and misrepresentations designed to benefit Qwest to the detriment of its customers. *See also Sparling v. Daou (In re Daou Sys.)*, 411 F.3d 1006, 1028 (9th Cir. 2005) (holding that a putative class action complaint alleging a fraudulent scheme and course of business by defendants sounded in fraud, when the "complaint goes on to allege myriad misrepresentations made by defendants, of which defendants had full knowledge, which induced plaintiffs' reliance, and which caused plaintiffs' damages").

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B. Plaintiffs Fail To Plead Their Claims With Requisite Particularity.

None of the Plaintiffs allege with particularity the circumstances surrounding the omissions or misrepresentations Qwest allegedly made prior to Plaintiffs signing up for high speed internet service or when Plaintiffs canceled their services.

With respect to Plaintiff Vernon, it is not clear ***when*** Plaintiff Vernon claims she was deceived by Qwest. Vernon claims that, prior to deregulation, "[i]n approximately 2005, she and her husband Robert ordered internet service through Qwest." (Am. Compl. ¶ 18.) But she also asserts that Qwest told her that her husband had entered into a contract with Qwest "approximately two years after the Vernons initially ordered internet service with Qwest." (*Id.* ¶ 20.) Further, it is not clear ***how*** Qwest misled Vernon because the FAC is vague as to whether Vernon denies that her husband had contact with Qwest two years into the service or whether she denies that in doing so, Mr. Vernon entered into a term contract with Qwest. It is not clear ***who*** was allegedly misled – was it Ms. or Mr. Vernon in 2005 under the tariffs, Mr. Vernon in 2007 when he ordered and accepted the Price for Life contract, or Ms. Vernon in 2008 when she was billed for the TLA?

Plaintiff Durkin's claims fare little better. While Durkin alleges that he responded to an advertisement in March of 2007, this advertisement is not alleged to have omitted information about the term commitment and TLA. (*Id.* ¶ 25.) It is not clear that the advertisement to which Durkin responded was even targeted toward the service or promotion that Durkin later requested. Durkin alleges that Qwest did not disclose, on his March 2007 telephone call to order service, that he would be subject to a $200 TLA if he cancelled service within two years. (*Id.*) But even assuming that this identifies a material omission with particularity, it still fails adequately to explain "why the . . . omission complained of was false or misleading." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (superseded by statute on other grounds). In particular, Mr. Durkin does not allege that he was not otherwise aware of the

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terms and conditions of the internet services he was to receive or that he was not pointed to Qwest's website and the attached Subscriber Agreement, setting forth the terms and conditions governing his contract. He does not, in other words, "give particulars as to the respect in which plaintiff contends the statements are fraudulent." *See Fidelity*, 213 F.R.D. at 575.[2]

Plaintiff Sandquist's allegations are similarly deficient. He alleges that he signed up for internet service by phone and was likewise not advised of the $200 TLA. (Am. Compl. ¶ 29.) As with Mr. Durkin's allegations, Mr. Sandquist does not allege how the omission was false or misleading, that he was not otherwise aware of the terms and conditions of the internet services he was to receive, that he was not pointed to Qwest's website or that he did not otherwise receive a copy of the Subscriber Agreement.

In short, one cannot discern from the FAC when and how the Plaintiffs claim to have been misled. Either Plaintiffs and putative class members are subject to a TLA, and the terms of that TLA are deliberately concealed, which is an omission, *or* Plaintiffs are not subject to a TLA but are told that they are, which is a misrepresentation. But both cannot be true. These general, contradictory allegations in support of claims sounding in fraud do not satisfy Rule 9(b)'s particularity requirements. *Cf. Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 955 (E.D. La. 1996) (dismissing complaint under Rule 9(b) when "it is difficult to determine from plaintiffs' complaint what information the defendants are alleged to have disclosed to the plaintiffs and what information they are alleged to have failed to disclose. The complaint is internally contradictory on these issues.").

Plaintiffs' claims concerning the broad class of omissions in advertising, purportedly applicable to all putative class members, are likewise deficient. Plaintiffs allege that Qwest

[2] Like Ms. Vernon, Mr. Durkin also alleges that he never received a written contract. (Am. Compl. ¶ 25.) This allegation suffers from the same flaw as the alleged non-disclosure over the phone – there is no allegation that Mr. Durkin was not otherwise aware of, or pointed to, the terms and conditions of the services he received from Qwest.

advertises its high speed internet services to consumers "on local phone bills[,] . . . on the internet, on television and by mailing unsolicited promotional materials throughout its service area." (Am. Compl. ¶ 11.) This advertising, according to Plaintiffs' FAC "does not disclose many of the terms and conditions Qwest later seeks to impose on its customers, including a term commitment and a $200 [TLA]." (*Id.*) Such general allegations do not suffice under Rule 9. *Cf., e.g.*, *Anderson*, 89 F.3d at 1410 (9th Cir. 1996) ("[Plaintiff] states time, place and content of the road-shows in the broadest of terms, and suggests that Stac officers made positive forecasts to promote the Stac offering. This does not suffice under Rule 9(b) . . . .").[3]

IV. EACH OF PLAINTIFFS' INDIVIDUAL CLAIMS FAIL.

A. Plaintiffs Fail To State A Claim For "Unlawful Penalties."

Plaintiffs' FAC fails to state a claim for "unlawful penalties." Count I of the FAC fails to give each defendant "fair notice" of what they are being accused of as required by Fed. R. Civ. P. 8.

Rule 8(a)(2) requires a complaint to contain a short and plain statement that the pleader is entitled to relief. *Rasidescu v. Midland Credit Mgmt., Inc.*, 435 F. Supp. 2d 1090, 1099 (S.D. Cal. 2006); Fed. R. Civ. P. 8(a)(2). It is well settled, however, that Rule 8 requires "some specificity." *Twombly*, 550 U.S. 554, 127 S. Ct. at 1967. Plaintiffs' FAC, however, contains almost no specificity at all with respect to Count I, let alone the specificity required by *Twombly*. Indeed, there is no such short and plain statement, with "some specificity," as to how each Defendant caused Plaintiffs an alleged injury. *Twombly*, 127 S. Ct. at 1967.

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[3] Plaintiffs' failure to plead their claims with sufficient particularity is underscored by the fact that Plaintiffs appear to suggest that Qwest committed fraud by failing to disclose the TLAs when Plaintiffs Vernon and Durkin originally purchased internet services prior to deregulation. As described above, such a claim is barred by the filed tariff doctrine – Qwest did not offer the Price for Life term contracts prior to deregulation, and any claim under such a contract would be contrary to the filed tariffs. If the Plaintiffs claim that fraud occurred prior to deregulation, then they must plead specifically how and when it occurred, including how such fraud could have occurred in light of the tariffs. By requiring Plaintiffs to plead their claims with particularity, the true nature of these claims will be manifest, and the application of the filed tariff doctrine will be clear.

Further, Plaintiffs' Count I, "Relief From Unlawful Penalties," is unrecognizable. No Colorado,[4] Washington, or Minnesota case has ever referenced such a cause of action, much less held such a claim actionable. In fact, no case in either federal or state court in any state where Defendants provide internet service has ever even referenced such a claim as "Relief From Unlawful Penalties." A complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Cmty. Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Here, Plaintiffs fail to state the elements of such a nebulous claim for "relief from unlawful penalties." *See id.*

Finally, to the extent that Plaintiffs attempt to assert a breach of contract claim, such a cause of action would require damages as an essential element and lacking such damages, Plaintiffs' claims fail. Under Colorado law, "[t]he elements of a breach of contract claim are: 1) the existence of a contract; 2) the failure of performance; and 3) damages." *F.D.I.C. v. First Interstate Bank of Denver, N.A.*, 937 F. Supp. 1461, 1476 (D. Colo. 1996) (citing *W. Distrib. Co. v. Diodosio,* 841 P.2d 1053, 1058 (Colo. 1992)); *see also* David K. DeWolf, Washington Elements of an Action, 29 Wash. Prac., Wash. Elements of an Action § 6:1 (2008-2009 ed.) (stating elements of breach of contract in Washington); 28 Minn. Prac., Elements of an Action § 4:1 (same, for Minnesota). Because Plaintiffs allege no damages, their contract claim must fail.

B. Plaintiffs' Claim For Unjust Enrichment Should be Dismissed.

Plaintiffs' FAC recognizes the Subscriber Agreement and seeks to invalidate various terms of it, including the TLA and the arbitration clause. (Am. Compl. ¶¶ 13, 29.) Plaintiffs cannot, however, simultaneously affirm the contract and assert a claim for unjust enrichment.

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[4] Pursuant to the Qwest Subscriber Agreement, the Parties have selected Colorado law to govern Qwest's high speed internet service, and Qwest asserts that such law should be applied. As explained herein, however, regardless of which state's law applies, Plaintiffs' claims fail.

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Unjust enrichment is an equitable theory that involves an implied contract at law when the parties have no express contract. *See Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000); *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258, 1261 (Wash. 2008) (holding unjust enrichment "is the method of recovery for the value of the benefit retained ***absent*** any contractual relationship") (emphasis added; citation omitted). A party cannot recover for unjust enrichment (quasi-contract) when the same subject matter is covered by an express contract "because the express contract precludes any implied-in-law contract." *Bedard v. Martin*, 100 P.3d 584, 592 (Colo. App. 2004) (dismissing unjust enrichment claim) (citations omitted)); *Go2Net, Inc. v. FreeYellow.com*, 126 Wn.App. 769, 783, 109 P.2d. 875, 881 (Wash. App. 2005) (affirming dismissal of unjust enrichment claim where contract claim was asserted at same time and plaintiff had adequate remedy at law); *United States Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981) ("[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract.") (citation omitted).

Courts have dismissed unjust enrichment claims where a party seeks to challenge a fee assessed pursuant to the parties' contract and the same result should obtain here. *Ehreth v. Capital One Servs., Inc.*, No. C08-0258RSL, 2008 WL 3891270, at *3 (W.D. Wash. Aug. 19, 2008) (dismissing unjust enrichment claim brought by plaintiff challenging late charge assessed by credit card provider). Indeed, it is well-established that a party to a contract may not disregard the contract "and bring an action on an implied contract relating to the same matter in contravention of the express contract." *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97, 103 (Wash. 1943).

C. Plaintiffs Fail To State A Claim For Violation Of Consumer Protection Act Statutes.

Plaintiffs fail to state a claim under the applicable consumer protection acts as well, because they fail to plead the essential elements of injury or causation.

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First, Plaintiff Vernon has not paid the TLA and therefore has not been injured. She affirmatively states in the FAC that she has refused to pay the TLA. (Am. Compl. ¶ 23.) Under both the Washington Consumer Protection Act and the Minnesota Prevention of Consumer Fraud Act, injury or damage to the plaintiff is an element of the claim. *See Robinson v. Avis Rent A Car Sys., Inc.,* 106 Wn.App. 104, 113, 22 P.3d 818, 823 (Wash. App. 2001) (elements under Washington Consumer Protection Act); *Higgins v. Harold-Chevrolet-Geo, Inc*., No. A04-596, 2004 WL 2660923, at *3-4 (Minn. Ct. App. Nov. 23, 2004) (elements of Minnesota Prevention of Consumer Fraud Act claim). While Plaintiffs assert that they "and the other class members" have been injured "in that these ***consumers*** have lost money" (Am. Compl. ¶ 59), Plaintiff Vernon does not identify any harm, injury, or damage that she has suffered.

Moreover, Plaintiffs did not allege that any allegedly deceptive practice caused Plaintiffs' harm. In order to state a claim, Plaintiffs must plead "a causal link between the unfair or deceptive act and the injury suffered." *See Indoor Billboard/Washington, Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10, 17 (Wash. 2007) (*en banc*); *see also Higgins*, 2004 WL 2660923, at *4 (requiring pleading that plaintiff's reliance on misrepresentation or deceptive practice harmed the plaintiff). Plaintiffs claim that "Qwest's failure to disclose the existence or amount of the [TLA] before Plaintiffs . . . agree to subscribe . . . is a deceptive practice." (Am. Compl. ¶ 56.) Plaintiffs' FAC does not, however, allege that this claimed omission caused Plaintiffs' injuries. Plaintiffs claim that they were harmed by "the invalid" TLAs (*id.* ¶ 59), but asserting that the TLAs are invalid is a challenge to the contract, not to the actual interaction that took place between the Plaintiffs and Qwest before Plaintiffs signed up for the Qwest service. Plaintiffs do not, for instance, allege that but for Qwest's failure to disclose the TLAs, Plaintiffs would not have signed up for Qwest's high speed internet service or would not have signed up for a term agreement. *See In re Apple & AT&TM Antitrust Litig.*, 2008 WL

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4810067, at *18 (dismissing Washington Consumer Protection Act claim where plaintiff failed to allege how her behavior would have changed if the "relevant disclosures" had been made). Moreover, Plaintiffs fail to plead how Qwest's alleged "threats" of TLAs could have caused Plaintiffs the type of injury that is cognizable under various states consumer protection acts. (Am. Compl. ¶ 59.)

Additionally, to the extent that Plaintiffs' consumer protection act claims rely on Qwest's alleged conduct prior to deregulation, the claims must fail. As discussed above in Section I.B., prior to deregulation of internet services by the FCC in 2005 and effective in 2006, Qwest simply could not have offered any service or any term and condition of service that deviated from the tariffs. Qwest's internet services, including TLAs, were governed by the filed tariff that had the force of law. As a matter of law, then, Qwest cannot now be held liable under any state's consumer protection act for representations or omissions it made regarding the tariffed internet services. *ICOM Holding, Inc.*, 238 F.3d at 222; *Hardy*, 86 Wn. App. at 492, 937 P.2d at 1131.

D. Plaintiffs Fail To State A Claim for Declaratory Judgment.

1. Count IV Suffers From The Same Deficiencies As Count I And Must Be Dismissed.

Similar to Count I, Plaintiffs' Count IV fails to give Defendants "fair notice" of what they are respectively being accused of and should be dismissed with prejudice. *See Rasidescu*, 435 F. Supp. 2d at 1099. Plaintiffs seek a declaration that Defendants' alleged charges constitute unlawful penalties, but fail to make sufficient allegations that there was a contract between the parties. In fact, Plaintiffs go to great lengths to ride the fence regarding whether they actually have a contract with Defendants – never pleading definitely one scenario or the other. In fact, in the very same paragraph that Plaintiffs cite to the parties' contract they also intimate no contract occurred. (*See, e.g.*, Am. Compl. ¶ 64 (alleging that "[w]hile the Subscriber Agreement was not signed, it provided for a month-to-month arrangement. . . . the

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agreements between Qwest and Class members would be unenforceable . . . even if such agreements occurred and could be proven.").)

2. Plaintiffs' Allegations Fail To Sufficiently Allege A Violation Of The Statute Of Frauds.

Plaintiffs' allegations fail to sufficiently allege a violation of applicable Statute of Frauds. For the Statute of Frauds defense to survive, there must be allegations regarding some violation of the applicable Statute of Frauds. Plaintiffs fail at this task on multiple levels.

First, Plaintiffs appear to be arguing in Count IV that they had an agreement and that Defendants orally altered it, but as discussed above, there are no allegations to support this contention. The allegations set forth in Plaintiffs' FAC are actually in contradiction of such an argument. Plaintiffs' allegations do not detail a violation of the Statute of Frauds, but at best, reveal a pure contract interpretation question. Plaintiffs' FAC appears to allege that their controlling agreement contained varying terms within it, that is, in one part a month-to-month commitment, while in another part, a "term commitment." (*See id.* ¶ 13 (detailing Subscriber Agreement section 12(c) regarding a "term commitment"); ¶ 14 (detailing Subscriber Agreement section 12(b) regarding a "month-to-month" commitment).) Completely absent from Plaintiffs' FAC is any semblance of the necessary elements to maintain the affirmative defense of Statute of Frauds concerning an alleged oral modification. Instead, Plaintiffs appear to be attempting to create an argument that is solely dependent on the four corners of the contract cited in their FAC. (*See id.*)

Second, Plaintiffs do not allege that they have a contract, or an alleged contract, that has a term that could not be performed within one year. *See Appleby v. Sprint Nextel Corp.*, No. 08-cv-23-JPG, 2008 WL 2130428, at *5 (S.D. Ill. May 20, 2008) (dismissing plaintiff's purported declaratory judgment statute of frauds claim, in part, because "[plaintiff] does not allege that the contract extensions she complains of are for services that cannot be completed within a year, so as to fall within the ambit of the Statute of Frauds."). Rather, Plaintiffs' FAC

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explicitly alleges the opposite, that is, that "[t]he only specific term of service set forth in the Subscriber Agreement is a month-to-month commitment." (Am. Compl. ¶ 14.)

CONCLUSION

For the reasons stated above, Defendants respectfully request this Court to dismiss Plaintiffs' First Amended Complaint.

DATED this 16th day of March, 2009.

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CERTIFICATE OF SERVICE

I, Cynthia A. Smith, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 16th day of March, 2009, I caused the preceding document to be served on counsel of record in the following manner:

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